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Supreme Court, U.S.
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No.....

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1986

Marco Samayoa, et al.,

Petitioners

- v. -

CHICAGO BOARD OF EDUCATION., et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether people adversely affected by a consent decree entered without findings of identified discrimination, cannot challenge the decree without showing that every feature of the decree is unconstitutional, where they had no notice and opportunity to participate fully and were denied intervention in the consent decree challenging their exclusion from a public school.

2. Whether in the context of a public school desegregation plan and consent decree, allegedly designed to eliminate segregation in the school system, "racial quotas" require and permit the exclusion of the disfavored children without providing a compelling justification and without providing a meaningful opportunity to attend other integrated schools, (A) regardless of whether a Desegregation Plan and Consent Decree is constitutional or (B) alternatively where the Consent Decree is unconstitutional.

3. Whether, consistent with Due Process, nonparties to a consent decree have an independent right to an adjudication of their claim that a defendant conduct is unlawful.

PARTIES

Petitioners:

MARCO SAMAYOA, by his mother Estela Samayoa; RANDY JAY LEVINE, by his mother J. Levine; MARTESE BOWMAN, by her mother Lizzie Bowman; ADAN FLEISCHAKER, by his mother Lizzie Fleischaker; MARIZOL PLANES, by her mother Martha Planes; WALTHER GORZELA, by his father Walther Gorzela; ANDREW GARTH HOSSMAN, by his mother Jill Hossman; TIFFANY SELINKO, by her mother Mary Ann Selinko; RAYMOND GROSS by his mother Virginia Tarasano; EMELY DYURASINOVIC, by her parent R. Dyurasinovic; JASON E. NAKUTNY, by his father Roman J. Nakutny; LAYTON HOWARD JR., by his mother Vivian N. Howard; CHELSEA CLEMENTZ, by her mother Hazel Clementz; LYDIA M. FISHER, by her mother C. Fisher; MICHAEL NOVAK, by his mother Maria Novak; JENNIFER BOTICH, by her mother Diane Botich; AUTUM TRACY NORTON, by her mother Peggy E. Norton; MICHAEL D. WACHOWIAK, by his mother Mary Kay Jarvis; KENT POWERS, by his mother Judith Powers; KAREN LEE, by her parent T. Lee.; ARMENOUHIE KASSARDJIAN, by his mother Marie Kassardjian.

Respondents:

BOARD OF EDUCATION OF THE CITY OF CHICAGO, MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, RAUL VILLALOBOS, past president, KENNETH SMITH, SOL BRANDZEL, LUIS SALCES, EDWIN CLAUDIO, ROSEMARY JANUS, MARTHA JANTHO, WILFRED REID, BETTY BONOW, JOHN D. FOSTER, ANGELINE CARUSO, Past Acting Superintendent of Schools, RUTH LOVE, Past Superintendent of Schools, HOWARD M. SLOAN, District 2 Superintendent, Dr. HENRY C. SPRINGS, Past Associate Superintendent, ROBERT GALLAHER, Past Principal of Walt Disney Magnet School, JOHN J. BEAN, Principal of Walt Disney magnet School.

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Opinion Below

The opinion of the Seventh Circuit Court of Appeals sought to be reviewed (App. A, infra) is reported at 798 F.2d 1046. Denial of Petition for Rehearing En Banc, with dissent,

(App. B, infra) is not yet reported. The opinion of the District Court (App. C, infra) is not reported. The District Court dismissed applying the rationale of United States v. Board of Education of Chicago (Johnson III) (App. D, infra) reported at 567 F. Supp. 290 (N.D. Ill. 1983) and United States v. Board of Education of Chicago, reported at 554 F. Supp. 912 (N.D.Ill.) aff'd, 717 F. 2d 378 (7th Cir. 1983).

Jurisdiction

The opinion of the Court of Appeals for the Seventh Circuit was entered on August 19, 1986. A timely Petition for Rehearing en banc was denied, with dissent, on December 10, 1986 and this petition for certiorari was filed within 90 of that date. This Court's Jurisdiction is invoked under 28 USC sec. 1254 (1).

Constitutional Provisions and Statutes

The relevant constitutional provisions and

statutes are: U.S.Const. Amends. V and XIV, Section 1; 42 USC sec 1981 and 1983, all of which are set forth seriatim in Appendix E.

Statement of the Case

I. THE DISSENTING OPINION

We adopt the statement of the case presented by the Honorable FRANK H. EASTERBROOK together with the Honorable RICHARD A. POSNER, JOHN L. COFFEY and DANIEL A. MANION, in their dissent to the petition for rehearing en banc (App. B, infra):

"Marco Samayoa and other children were admitted to the Walt Disney Magnet School (hereinafter "Disney"), a public elementary school in Chicago. The Consent Decree now governing Chicago's public schools calls for annual revisions of the quotas at each school as the city's racial makeup changes. The number of white students in Chicago continues to fall. The revision effective in the fall of 1981

reduced the quota in force at Disney School and compelled the exclusion of the plaintiffs-American Indians, Cubans, and others of various lineages."

"The panel held, 798 F.2d 1046, (App. A, infra), that the plaintiffs have not stated a constitutional claim. It relied principally on United States v. Board of Education, 567 F. Supp. 290 (N.D. Ill. 1983) (Johnson III), (App. D, infra), which rejected a claim made by black students excluded from schools in Chicago in order to make room for white students. The district court observed in Johnson III that every remedy for segregation entails the drawing of racial lines and that every line will affect some people more than it affects others. 567 F. Supp. at 295. (App. D, infra). Everyone has a racial identity, so if a line could be attacked on the ground that it injured a given person or race, the school board would

be unable to consider race in assigning students to schools. The district court concluded that the way around this difficulty is to require any person objecting to the use of race to attack the Plan as a whole. Id. at 295-6. (App. D, infra). No one may attack any particular line, the court held. The Plan as a whole had been upheld by an earlier opinion of the district court, so Johnson III concluded that the plaintiffs could not obtain relief. The panel endorsed Johnson III, see 798 F. 2d at 1049-50. (App. A, infra)."

The dissent concluded: "The analysis of Johnson III is problematic, however, enough so that our court should review the matter independently."

We add that the exclusion of the children at Disney did not involve the reassignment of students and did not provide them with any meaningful opportunity to attend other

integrated schools. Further, the program at Disney is a unique program.

II. THE PETITIONERS' ASSERTIONS BELOW

Petitioners contended that the Chicago Board of Education (hereinafter "Board"), lacked the power to exclude the children without a compelling justification. They lack said power today and will lack it in the future unless and until some compelling justification is found demonstrating the alleged necessity of the drastic "remedy" of exclusion.

Furthermore, even assuming arguendo, the existence of said compelling justification, the Board did not bother to arrange for Petitioners to attend a different pre-kindergarten school in order to desegregate the school, but sent the children home denying them admission and depriving them of a unique quality integrated education at Disney, and may have deprived them altogether of any integrated education.

The respondents contended that the challenged practices are required by the Desegregation Plan of the City of Chicago and the Consent Decree. Nowhere, however, is there an admission or an adjudication or a finding of any past racial discrimination by the Board, nor is there a finding by the Court that a "remedy" is necessary.

Petitioners asserted that a Desegregation Plan that has a proper constitutional purpose cannot ignore the welfare and the constitutional rights of the concrete individuals. Without a factual determination, the exclusion of the children is beyond the constitutional scope, if any, of the Desegregation Plan and the Consent Decree.

Petitioners asserted that the State is never empowered to violate the inalienable rights of individuals and that at the very least, the claim that the exclusion of the individual

children is a permissible infringement, and an acceptable hardship, and that it is the only relevant and necessary alternative to de facto, societal discrimination, must be subjected to the strictest scrutiny, designed to remedy prior discrimination, and requiring the District Court to make a factual determination that the Board had a strong basis in evidence for its conclusion that such remedial action was necessary. Furthermore, Petitioners had no prior notice of and were not party to the Consent Decree, nor to the designing of the Desegregation Plan, nor were they in privity with, nor were their interests represented by any party.

On July 8, 1982, the court ordered the Board to present a motion to transfer this case before Judge Shadur in reference to Johnson v. Board of Education of City of Chicago, 102 S. Ct. 2223 (1982). But on July 22, 1982 Judge

Shadur denied the motion.

Petitioners also filed a motion for leave to intervene in the Consent Decree suit in order to challenge that decree on its face. The Board opposed the motion on the grounds, among others, that it was untimely and it asserted interests already adequately represented by the Board. The motion to intervene was denied. No appeal was taken.

III. THE DISTRICT COURT DECISION-

The District Court's Order (App. C, infra) granted the Respondent's motion to dismiss relying in the rationale of Johnson III (App. D, infra). The court took the position that court approval of a Desegregation Plan for the entire school system precludes attacks on separate aspects of the Plan, taken in isolation.

IV. THE SEVENTH CIRCUIT DECISION-

The panel concluded that people adversely

affected by a Consent Decree cannot attack the decree without showing that every feature of the decree is unconstitutional.

Argument

I. Introduction.

This case involves important questions regarding fundamental rights of individuals to the equal protection of the laws, fairness and due process, and the impact upon those rights of a prior Consent Decree between the Board and the Federal government.

II. People Adversely Affected By A Consent Decree Can Attack The Decree Without Showing That Every Feature Of The Decree Is Unconstitutional.

We adopt the dissenting opinion as our own for it states accurately our argument.

If the Board of Education, without any prior notice nor participation of the victims, were

to kill the children on the alleged ground that the philosophy of the Desegregation Plan and a provision of the Consent Decree required such killing in order to make room to place other children of other races, this court would certainly hold that such an action is not only brutal, but is at a minimum too burdensome, unnecessary and not narrowly tailored to the valid purpose of the Plan. The Court would not hold the Desegregation Plan unconstitutional, for the Plan cannot possibly require such an unconscionable act, nor would the court say that the deceased children must attack <u>every</u> feature of the decree before finding the action unconstitutional nor will the court say that the deceased children are collaterally attacking the Desegregation Plan because the philosophy of the Plan compels the killing, for this is not true.

We think this analogy drives the point home.

The exclusion of the children is tantamount to killing the opportunity that the excluded children have to receive a quality integrated education and in fact deprived them of a unique quality integrated education at Disney and it may have deprived them of the opportunity to receive any integrated education in other schools of the system. The exclusion is too burdensome and the Desegregation Plan and racial quotas do not and cannot require the same.

The panel permits the shuffling of children from one school to another on account of their race without any factual determination nor any finding that a quota system is an appropriate remedy for any misconduct that may have occurred in Chicago. "Some such finding, based on a likelihood of a violation, is essential before children may be shuffled from one school to another on account of their race." Dissent

(App. B, infra).

It is a fundamental premise of preclusion law that nonparties to a prior action are not bound by the judgment. Sea-Land Services, Inc. v. Gaudet, 414 US 573, 593.

This principle should apply with all the more force to a Consent Decree, which is little more than a contract between the parties, formalized by the signature of a judge, without any adjudication on the merits. Firefighters Local 93 v. City of Cleveland, 106 S. Ct. 3063, 3073-80. Such a decree binds the signatories, but cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree. See dissent on denial of petition for rehearing en banc (App. B, infra).

III. Nonparties Have An Independent Right To An Adjudication Of Their Claim That A Defendant's Conduct Is Unlawful.

There is no suggestion that a Consent Decree to which petitioners were not a party divests federal courts of jurisdiction. The panel did not explain why the plaintiffs must attack the whole decree in order to be heard on their own claims. See dissent to denial to petition for rehearing en banc (App. B, infra): "A doctrine that makes jus tertii claims essential to constitutional litigation has little to recommend it and Article III of the Constitution to condemn it."

IV. Petitioner's Action Do Not Constitute An Impermissible Collateral Attack Upon Any Valid Provision of the Decree.

The appellate panel is of the opinion that in the context of a public school Desegregation Plan, allegedly designed to eliminate

segregation in a school system, "racial quotas" require and permit the exclusion of the disfavored children without providing such students a meaningful opportunity to attend other integrated schools, while other unidentified children occupy their places.

The panel miscontrues the meaning of "racial quotas" in the context of affirmative action programs in light of the recent decisions of the Supreme Court of the United States in Wygant v. Board of Education, 106 S. Ct. 1842 (1986); Local 28 of the Sheet Metal Workers International Association vs EEOC, 106 S. Ct. 3019 and Local 93, International Association of Firefighters vs. City of Cleveland, 106 S. Ct. 3063; United States v. Paradise, ___U.S.____; 47 CCH S. Ct. Bull p. B11776 (No. 85-999), decided February 25, 1987.

The court reasons in substance as follows:

1. The Desegregation Plan and racial quotas require and permit the absolute exclusion of the disfavored children.

2. Petitioners challenge the absolute exclusion of the disfavored children and all racial quotas.

3. Therefore, Petitioners challenge the Desegregation Plan, and it follows that this is a collateral attack that must fail.

We assert that neither the Desegregation Plan of the City of Chicago, nor Racial quotas per se can properly require the absolute exclusion of children from the school system, and we deny that we challenge all racial quotas and the whole Desegregation Plan.

We subscribe with the position taken by Judge Richard A. Posner, in Britton v. South Bend Community School Corp., No. 84-2841 at page 14 of his dissent:

> "I am willing to accept that the equal protection clause means as a practical matter less for whites than for blacks but not that it means nothing at all, which if this decision stands will be the approximate situation in this circuit after today"

This position of Judge Posner is the same position we express when we assert that it is not true that one who accepts a race-conscious admission system cannot complain when racially-based exclusions materialize. This is true because the exclusion that is permitted by the constitution only increases slightly the opportunity of access or the random chances of the favored group while decreasing slightly the random chances or the opportunity of access of the disfavored group, bringing both favored and unfavored groups into parity. The current disparity exists because of some prior and unfair discrimination which creates an unequal distribution of benefits. However, the constitution does not allow the absolute exclusion of any individual. Even disfavored members of a group must still have a chance.

From its very inception petitioners did not object to racial quotas per se, nor to

affirmative action in general. Petitioners state and stand on their statement that "Whether or not the Desegregation Plan and Consent Decree of the City of Chicago is constitutional, exclusion of the children at Disney without providing them with a meaningful opportunity to attend other integrated schools is a violation of their constitutional rights and totally unwarranted and unjustified".

Petitioners' Fourth Amended Complaint, Count I, filed February 3, 1982 asks the court to enjoin defendants from forcing or effectuating the Board's rejection Nexclusion; and implementing across the Board the impermissible use of certain racial quotas; to declare unconstitutional said action rejecting Nexcluding; the children from the school and implementing the impermissible racial quotas; and for an order directing the admission of the children excluded by defendants and for actual

and punitive damages and attorney's fees.

The Fourth Amended Complaint does not ask the court for "entry of a permanent injunction to prohibit the Walt Disney Magnet School from using racial quotas", as asserted by this Court (App. A, infra). The limited challenge made by petitioners is to the exclusion of the children because of the impermissible use of certain racial quotas. Petitioners never contested the use of all but only of certain (or some) racial quotas. This theory of Petitioners was expressed as follows: "Some uses of racial quotas are unconstitutional" while challenging unambiguously the implied Board's assertion that "Some uses of racial quotas are constitutional."

This distinction which the District Court confronted and found difficult to decipher and interpret is completely disregarded by this appellate panel.

We assert that neither the Desegregation Plan of the City of Chicago, nor Racial quotas per se require the absolute exclusion of children from the school system. If that were the case we certainly would be attacking the Desegregation Plan as unconstitutional as a whole.

No justification for the absolute exclusion of the children can be found neither in racial quotas nor in the Desegregation Plan. Improper use or application is totally different from improper purpose. A Desegregation Plan that has a proper constitutional purpose cannot require the absolute exclusion of the children because it "cannot ignore the welfare and the constitutional rights of the concrete individuals."

The absolute exclusion of the children cannot be required by any Desegregation Plan, nor by any racial quota, nor by any affirmative

action plan. Said absolute exclusion of the children violates the Equal Protection Clause of the Fourteenth Amendment, whether or not the Desegregation Plan of the City of Chicago is constitutional.

Petitioners do not have to provide any reasons for their exclusion from the school system. It is Respondents who must explain why the children are excluded and the Chicago officials did not offer such justification and the panel did not discuss any. Neither racial quotas nor the Desegregation Plan approves nor justifies the absolute exclusion of the children from the school system. This is particularly true because at Disney "the uncontroverted testimony shows that in the history of Disney all children who were accepted for enrollment were <u>entitled</u> to attend the School until they moved out of the 7-District area served by the School or left

voluntarily. The Board did not present any witnesses despite numerous opportunities."

In Wygant the Court held that in the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored. The absolute burden imposed on particular identified individuals is too intrusive and not diffused among society generally. Wygant, 106 S. Ct. 1842 (1986).

The effect, injury and burden that this absolute exclusion has on the children would be better presented on the trial on the merits. We cannot present here psychiatric testimony, nor the expenses incurred by the children since petitioners have not yet been afforded the opportunity to present such evidence. We submit, however, that the killing of the opportunity that these children have to receive

a unique quality integrated education at Disney or at any other equivalent school is more than burden enough. The absolute exclusion and privation of a quality integrated education is a most extraordinary burden.

The court states (App. A, infra): "The plaintiffs had been accepted for enrollment but had not actually been enrolled in the school when the racial quotas were changed". The assumption is that the acceptance of the children is of no consequence unless they have been enrolled in the school. That gratuitous assumption is not supported by the record. In the first place the decision to enroll or not is a decision to be taken by the children and the parents of the children. Furthermore, at Disney "the uncontroverted testimony shows that in the history of Disney all children who were accepted for enrollment were entitled to attend the School until they moved out of the school

District area served by the School or left voluntarily. The Board did not present any witnesses despite numerous opportunities."

Since the children believe in affirmative action and are participants in the random selection that applies to all group applicants, said children cannot complain if not selected or accepted. If not selected the only exclusion they experience is a relative exclusion. Said relative exclusion is based on the fact that the random chances of selection have been reduced to the extent that the children of other races are favored by the odds in the lottery. But this is a group effect, not a particular effect pinpointed on an individual.

Once the individual has been accepted, however, the effect of a subsequent exclusion is concentrated on him and not on the group to which he belongs. This is the same effect referred to in Wygant "...in cases involving

valid hiring goals, (where) the burden to be borne by innocent individuals is diffused to a considerable extent among society generally, Wygant, 106 S. Ct. 1842 (1986). And, while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs Nexclusions; impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive, Wygant, 106 S. Ct. 1842 (1986).

Petitioners distinguish between school desegregation cases involving remedies for clearly determined constitutional violations and the use of fixed exclusionary quotas that were held unlawful in University of California Regents v. Bakke, 438 U.S. 265. Petitioners assert that neither the Desegregation Plan of the City of Chicago, nor racial quotas, nor the Consent Decree require the exclusion of

children from Disney nor from any school, since no compelling justification has been shown for such exclusion. Petitioners do not attack the purpose of the Plan and the Consent Decree *per se*, rather they attack the fact that no factual determination nor finding of a compelling justification for its application in excluding the children has been presented. It follows that if there is no attack, there cannot be a collateral attack.

Although the United States Supreme Court has approved the use of racial categories to insure racial integration that does not mean that all quotas are permissible if the aim is good. In the school-desegregation cases attention to race is allowed in order to ascertain whether school boards that had been discriminating wrongfully by race had really ceased to do so. Racial identification is permitted there--*but only to insure that all students, of whatever*

race, received absolutely equal treatment. the distinction between that use of race as counting or as a measure, and the use of racial categories to reintroduce special preference, is sharp and profound. Preferential uses of quota and race, either to exclude or to include, are unconstitutional, unless said quotas have a compelling governmental purpose, and are relevant and necessary to the achievement of said governmental purpose without creating unacceptable hardships and suffering on identifiable individuals (See Powell, J. University of California Regents v. Bakke, 438 U.S. 265, 287-324.

The appellate court is not distinguishing between a school desegregation case involving, as it should, remedies for clearly determined constitutional violations, and the use of racial categories to reintroduce special preferences or detriments.

In the Bakke case 438 U.S. at 300 Justice Powell stated:

"The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. E.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1,28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971); McDaniel v. Barresi, 402 U.S. 39, 28 L. Ed. 2d 582, 91 S. Ct. 1287 (1971); Green v. County School Board, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement[39] . Moreover, the scope of the remedies was not permitted to exceed the extent of the violations. E.g., Dayton Board of Education v. Brinkman, 433 U.S. 406, 53 L. Ed. 2d 851, 97 S. Ct. 2766 (1977); Milliken v. Bradley, 418 U.S. 717, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974); See Pasadena City Board of Education v. Spangler, 427 U.S. 424, 49 L. Ed. 2d 599, 96 S. Ct. 2697 (1976). See also Austin Independent School Sist. v. United States, 429 U.S. 990, 991-995, 50 L. Ed. 2d 603, 97 S. Ct. 517 (1976) (Powell, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification."

Footnote 39 reads as follows:

Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: Offermann v. Nitkowski, 378 F2d 22(CA2 1967); Wanner v. County School Board, 357 F2d 452 (CA4 1966); Springfield School Committee v. Barksdale, 348 F2d 261 (CA1 1965). Of these, Wanner involved a school system held to have been de jure segregated and enjoined from maintaining segregation; racial districting was deemed necessary, 357 F2d, at 454. Cf. United Jewish Organizations v. Carey, 430 U.S. 144, 51 L. Ed. 2d 229, 97 S. Ct. 996 (1977). In Barksdale and Offermann, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. (emphasis ours). See Keyes v. School District No. 1, 413 U.S. 189, 240-250, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973) (Powell, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education. (emphasis ours).

"Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education."

V. In The Alternative The Desegregation Plan And Consent Decree Is Unconstitutional.

The dissenting opinion (App. B, infra) points out that the crux of the matter consists of the annual readjustments of the racial quotas which are not justified as a remedy for an established wrong and which the appellate court has never found to be constitutional. Petitioners adopt such argument as their own. It is not inconceivable that the decree may contain illegal provisions, and/or that the general provisions may be unjustified as applied in this case. This Court has acknowledged that even where Congress has approved a general race-conscious program designed to correct past discrimination, that a "particular application" of a preference may be overinclusive and bestow a benefit on the basis of race that cannot be justified. Fullilove v. Klutznich, 448 US 448, 486 (1980).

VI. The Appellate Court Erred In Failing To Address And Examine The Constitutionality Of The Consent Decree.

The panel said (App. A, infra) at 798 F. 2d at 1049 that "the plaintiffs' argument was adequately addressed in United States v. Chicago Board of Education, 554 F. Supp. 912 (N.D. Ill. 1983), aff'd, 717 F. 2d 378 (7th Cir. 1983)." But the courts opinion at 717 F. 2d 378 was concerned only with the district court's order to the United States to provide additional funds to the Chicago Board of Education. The appellate Court has never passed on the adequacy of the Plan as a whole, on its application to Disney School in particular, or on the feature of the Plan that gave rise to this case-the alteration in the quota every year to reflect changes in Chicago's population. See dissent to denial of petition for rehearing en banc (App. B, infra). This in

spite of the opinion of the Supreme Court of the United States in Johnson v. Board of Education of City of Chicago, 457 U.S. 52 at 53-54 (1982) which reminded the court: "Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals." The Supreme Court expected the appellate court to turn once more to the merits of racial quotas in Chicago's schools. This, the appellate court has not done.

More than 30 years ago the Supreme Court of the United States condemned the "separate but equal doctrine". The court would not sanction the relative exclusion of black children even if they were placed in separate but equal public institutions. Today, this circuit sanctions what can only be called the "separate

and unequal doctrine" for it approves the absolute exclusion and segregation of certain children because of their race, without placing them even in unequal learning institutions.

The children remain excluded, the court refuses to enter a declarative judgment and an injunction declaring their absolute exclusion as unconstitutional. After Disney, in this circuit, the absolute deprivation of a quality integrated education is not offensive nor a heavy burden.

Conclusion

Petitioners submit that the Petition for Writ of Certiorari should be granted for the reasons aforesaid.

Respectfully submitted,

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APPENDIX A

No 86-1355

In The
UNITED COURT OF APPEALS
For the Seventh Circuit

MARCO SAMAYOA, et al.,
Plaintiffs-Appellants

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 80-4261-Charles R. Norgle, Judge

Decided August 19, 1986*

Before BAUER, WOOD, Jr., and FLAUM, Circuit Judges.

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* Oral argument on this case was held on November 8, 1985. On February 12, 1986, this court dismissed the appeal for lack of jurisdiction. As the jurisdictional problem had been resolved, on February 28, 1986, plaintiffs filed a new appeal and resubmitted their briefs from the original appeal.

Wood, Jr., Circuit Judge. Plaintiffs' original interlocutory appeal in this case was dismissed for lack of jurisdiction. Samayoa v. Chicago Board of Education, 783 F. 2d 102 (7th Cir. 1986). As the jurisdictional problem no longer exists, the plaintiffs now reassert their appeal from the dismissal of Count I of their complaint. We affirm.

The district court described the case as follows:

> This suit alleges racial discrimination in the operation of the Walt Disney Magnet School, a Chicago public elementary school. . . .
>
> Count I alleges that the defendants, the Chicago Board of Education and various school officials, violated the constitutional rights of a group of Cuban, American-Indian, and white children, aged 3-4. These children were originally admitted to the Walt Disney Magnet School's pre-kindergarten program in June, 1981, but their admission was revoked two months later, after the school district decided to revise the racial composition of the geographic area from which the school draws pupils. (Fourth Amended Complaint, Count I, par. VII). Count I alleges that the defendants' actions were discriminatory

because they revoked the admission of only Cubans, American-Indians and white students.

Count II is based upon the deed for the property on which the school stands. The property was granted by the federal government to the City of Chicago for the purpose of establishing a school; in the deed the city allegedly agreed to comply with title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally-funded programs. (Complaint, Count II, par. XIII). Count II alleges that the revocation of the children's admission to the school violates this contract between the federal government and the city. Paragraph XIV of Count II also alleges a series of other breaches of this contract, e.g. the lay-off of teachers and other staff, an increased student-teacher ratio, budget cuts and other changes allegedly weakening the school's educational program. The complaint alleges that these changes contribute to "white flight" by making the magnet school less attractive and therefore contravene the goals of Title VI.

Count III alleges both a due process and an equal protection violation of the rights of the children whose admissions were revoked. The complaint alleges that on October 20, 1981 the school board held a "purported hearing" regarding the revocation. This hearing did not meet minimum standards of procedural due process, however, according to the complaint. Furthermore, after the hearing the Board subsequently admitted 5 and 6-year olds who were originally rejected with the younger plaintiffs here, but did not give a reason for treating the younger

children differently.

> Plaintiffs seek injunctive relief and specific performance of the deed to prevent the school board from continuing to discriminate against the plaintiff's racial and ethnic groups. Plaintiffs also seek compensatory and exemplary money damages. Although this suit originally was filed as a class action, plaintiffs in their status report now state that it is being brought only on behalf of the plaintiffs in their individual capacities.

In the original appeal this court determined that the district court's dismissal of Count I was not "directed specifically toward the denial of permanent injunctive relief," Samayoa, 783 F. 2d at 104, and the dismissal thus could not be appealed immediately under 28 U.S.C. sec. 1292(a)(1). This court furthermore stated that even accepting the dismissal of Count I as "an effective denial of a permanent injunction so as to make it reviewable by interlocutory appeal," Id., the lack of an emergency or an urgent need to appeal while Count III still remained for trial in the

district court counseled against allowing the appeal of Count I.

Consequently plaintiffs returned to the district court and asked for a dismissal of Count III. The district court dismissed Count III on May 12, 1986. The plaintiffs are here again appealing the dismissal of Count I and urging this court to reverse and remand this case for entry of a permanent injunction to prohibit the Walt Disney Magnet School from using racial quotas, entry of an order directing the immediate admission of children excluded by the racial quotas, and an award of attorney's fees.

We agree with the district court that the rationale of United States v. Chicago Board of Education (Johnson III), 567 F. Supp. 290 (N.D. Ill. 1983), applies here. The plaintiffs in Johnson challenged as unconstitutional the desegregation plan voluntarily adopted by the

Board. The desegregation plan imposed racial quotas and a ceiling on enrollments in two high schools. The plaintiffs were black children and their parents who resided in the attendance areas of the high schools. The plaintiffs asserted that the desegregation plan as applied to the two high schools violated 42 U.S.C. secs. 1981 and 1983 and 20 U.S.C. sec. 1703(c) by restricting minority student admission to these schools solely on the basis of race. The district court in Johnson found that "(s)tripped of rhetoric, plaintiffs' contention is really that (1) each individual aspect of the (desegregation) plan and (2) every impact of every element within it must pass strict constitutional scrutiny." 567 F. Supp. at 295. The Johnson court agreed with the Board that "the narrow and specific relief sought by the Johnson and Milton, plaintiffs was subsumed by that provided in the United States (v. Chicago

Board of Education, 554 F. Supp. 912 (N.D. Ill.), aff'd, 717 F. 2d 378 (7th Cir. 1983),) action, which was brought on behalf of all the minority students in the Chicago public schools." Id. The district court reasoned that the "(i)mplementation of the (Consent) Decree has transformed claims that must be scrutinized against the (desegregation) (p)lan as an entirety." Id. at 296.

Applying this reasoning the Johnson court concluded that the plaintiffs' challenges were collateral attacks on a desegregation plan that had already been found constitutional, and "(a)pproval of the Plan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum, isolated from the other aspects of the Plan." Id. The court stated that the plaintiffs' efforts to inquire further into the Board's motives in instituting the Plan

were unwarranted because "the actions sought to be stigmatized are part of a nondiscriminatory whole." Id. The Johnson court therefore found that the Board was entitled to judgment as a matter of law and dismissed the plaintiffs' claims.

The plaintiffs here attempt to distinguish this case from Johnson, but their arguments are unpersuasive. Plaintiffs point out that the Johnson children were given an opportunity to transfer to another school, were not accepted and then rejected, and were all black children as opposed to the white, Cuban, and American-Indian children involved here. Plaintiffs' main distinction, however, is that the Johnson plaintiffs attacked the desegregation plan as a whole; and the plaintiffs here maintain that they do not challenge the plan as a whole nor are they mounting a collateral attack "on any facet or

part of the same."

The thrust of plaintiffs' suit is, as the issue heading in plaintiffs' reply brief indicates, that the exclusion of the children because of their race violates the Equal Protection Clause of the Fourteenth Amendment." This was the exact argument presented in Johnson,[1] see 567 F. Supp. at 294. The district court therefore was correct in relying on Johnson to determine the outcome here. Moreover, as the Johnson court recognized, the plaintiffs' argument was adequately addressed

---

1 In Johnson, the plaintiffs described their claim in the following terms:

> (P)laintiffs' claim is based on the right to equal treatment: the Board's quotas deny black children that reside in the Gage Park and Morgan Park attendance areas the opportunity to attend a neighborhood school when this opportunity is not similarly denied to any white child that resides in these attendance areas, or anywhere else in the city of Chicago. This, plaintiffs urge, is unconstitutional discrimination on the basis of race.
>
> 567 F. Supp. at 294

in United States v. Chicago Board of Education, 554 F. Supp. 912 (N.D. Ill. 1983), aff'd, 717 F. 2d 378 (7th Cir. 1983). In United States, the court held that "(e)ven where there is a disproportionate allocation of burdens (and it should be repeated none has been shown here), the Constitution is not offended unless the disproportion is arbitrary or invidious-unless it stems from purposes other than legitimate plan-development and plan-implementation." Id. at 923.

The district court found that the plaintiffs admitted that the actions complained of in Count I were done to comply with the overall desegregation plan. The district court thus concluded that "Count I challenges an individual aspect of the overall plan, and the rationale of Johnson III applies with equal force to this case." The plaintiffs contend, however, that they never made such an admission

and that they merely stated that the only reason given for the exclusion of the children was the change of racial quotas.

The letter that the plaintiffs received in August 1981 from the Disney school stated:

> (T)he Office of Equal Educational Opportunity of the Chicago Board of Education announced racial guidelines for entering students for Walt Disney Magnet School effective September, 1981. . . .We are sorry to inform you that according to the above Guidelines, your child will not be entering Disney in September but instead has been placed on the Hold List. . . .We sincerely regret any inconvenience this change may cause you but Disney has now been directed to reflect the philosophy and Guidelines of Chicago's current Desegregation Plan.

Plaintiffs claim that the defendants used the desegregation plan "as an excuse but that cannot be the real reason" for their exclusion from the Disney school. The plaintiffs, however, do not provide any other reason for the exclusion, nor do they support their allegations that the "actions of the Board are pretextual, based on deceit and hypocrisy."

Plaintiffs urge this court to require the Board to explain why the guidelines and philosophy of the desegregation plan compel racial quotas and the exclusion of the plaintiffs. The Board, however, need not do that as the use of racial quotas and assignment schedules for students has already been approved in United States v. Chicago Board of Education.

The plaintiffs also argue that even if Johnson does apply to this case, the decision in Johnson was incorrect. The plaintiffs agree with the Johnson court that "(a)pproval of the (desegregation) (p)lan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum," 567 F. supp. at 296. But plaintiffs disagree that "(i)mplementation of the (Consent) Decree has transformed claims of individual constitutional deprivation into claims that must be scrutinized against the

Plan as an entirety." Id. The plaintiffs contend that this statement is "not true in all situations, and certainly it is not true when there is an invidious discrimination as in Disney." The plaintiffs then discourse upon utilitarianism and the relationship between the individual and the whole community, concluding, among other things, that "(t)he Desegregation Plan as a whole cannot ignore the welfare and the constitutional rights of the concrete individuals." Plaintiffs' concerns have been amply addressed in the United States litigation, see 554 F. Supp. at 922-26.

As this discussion illustrates, the plaintiffs are indeed necessarily attacking the desegregation plan as a whole by challenging its effect upon them. We agree with the Johnson court's assessment of this argument:

> So viewed, plaintiffs' contentions do become collateral attacks on a Plan that has passed constitutional muster. This Court has found the burdens of the Plan (in terms of

> students in attendance outside their neighborhood schools) impact in a way strikingly proportional to the racial makeup of the school population as a whole, (United States v. Chicago Board of Education,) 554 F. Supp. at 922-23. Any such outcome must perforce be the result of heavier impact in some places and lighter impact in others-else every component of the system would have to replicate in microcosm what the entire system reflects in macrocosm. And that the Constitution has never mandated, see Id. at 923-24. For that reason plaintiffs' efforts to compel further factual probing into Board's motives are bootless, for the actions sought to be stigmatized are part of a nondiscriminatory whole.

Johnson III, 567 F. Supp. at 296.

Plaintiffs also assert that the defendants have not even complied with the desegregation plan on which they rely. Plaintiffs point to section 2.2 of the "Student Assignment Principles" which provides:

> The Board will implement magnet schools. . . Magnet schools shall contain racial/ethnic goals . .to ensure that their racial/ethnic composition achieves integration-desegregation at a level 15%-35% white (65%-86% minority) by September 1982, with respect to entering grades, and with respect to other grades to the extend (sic) the goal can be achieved without excluding students

presently enrolled.

Part II, Student Desegregation Plan for the Chicago Public Schools, pp. 5-6 (emphasis added). The defendants, however, did not violate section 2.2 by excluding the plaintiffs because the plaintiffs were not "presently enrolled" in Disney. The plaintiffs had been accepted for enrollment but had not actually been enrolled in the school when the racial quotas were changed.

For the reasons stated above, the district court's dismissal of Count I is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In The
UNITED COURT OF APPEALS
For the Seventh Circuit

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, Jr., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

No 86-1355
MARCO SAMAYOA, et al.,
Plaintiffs-Appellants

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 80-4261-Charles R. Norgle, Judge

Decided December 10, 1986

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiffs-appellants on September 2, 1986, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing in banc.[1] All of the judges on the original panel petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

1 Judges Posner, Coffey, Easterbrook, and Manion voted to grant rehearing in banc. Judge Posner joins in Judge Easterbrook's dissent to the Order of this Court denying rehearing in banc and Judge Coffey joins part two and three of Judge Easterbrook's dissent. Judge Easterbrook's dissent follows this Order.

EASTERBROOK, Circuit Judge, with whom POSNER, Circuit Judge, joins, and COFFEY, Circuit Judge, joins with respect to Parts II and III, dissenting. Marco Samayoa and other children were admitted to the Walt Disney Magnet School, a public elementary school in Chicago. The consent decree now governing Chicago's public schools calls for annual revisions of the quotas at each school as the city's racial makeup changes. The number of white students in Chicago continues to fall. The revision effective in the fall of 1981 reduced the quota in force at Disney School and compelled the exclusion of the plaintiffs-American Indians, Cubans, and others of various lineages."

"The panel held, 798 F.2d 1046, that the plaintiffs have not stated a constitutional claim. It relied principally on United States v. Board of Education, 567 F. Supp. 290 (N.D.

Ill. 1983) (Johnson III), which rejected a claim made by black students excluded from schools in Chicago in order to make room for white students. The district court observed in Johnson III that every remedy for segregation entails the drawing of racial lines and that every line will affect some people more than it affects others. 567 F. Supp. at 295. Everyone has a racial identity, so if a line could be attacked on the ground that it injured a given person or race, the school board would be unable to consider race in assigning students to schools. The district court concluded that the way around this difficulty is to require any person objecting to the use of race to attack the Plan as a whole. Id. at 295-6. No one may attack any particular line, the court held. The Plan as a whole had been upheld by an earlier opinion of the district court, so Johnson III concluded that the plaintiffs could

not obtain relief. The panel endorsed Johnson III, see 798 F. 2d at 1049-50. The analysis of Johnson III is problematic, however, enough so that our court should review the matter independently."

I

The position taken by the panel-that people adversely affected by a consent decree cannot attack the decree without showing that every feature of the decree is unconstitutional-collides with Firefighters Local 93 v. City of Cleveland, 106 S. Ct. 3063, 3073-80 (1986), which was decided after Johnson III and which the panel did not cite. Firefighters holds that for most purposes a consent decree is a contract. See also United States v. Western Electric Co., 797 F. 2d 1082, 1089 (D.C. Cir. 1986). Parties to litigation may not sign contracts, with or without the court's approval, that stipulate away the rights of

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strangers. Secretary of Labor v. Fitzsimmons, No. 84-2827 (7th Cir. Oct. 30. 1986) (en banc), slip op. 25-28. A person is bound by a judicial decree only to the extent he had notice and an opportunity to participate fully. Consent decrees therefore are open to challenge by strangers. See United States v. Jefferson County, 720 F. 2d 1511, 1517-18 (11th Cir. 1983); Ashley v. City of Jackson, 464 U.S. 900, 901-02 (1983) (Rehnquist & Brennan, JJ., dissenting from the denial of certiorari). See also United States v. City of Miami, 664 F. 2d 435 (5th Cir. 1981) (en banc); EEOC v. Safeway Stores, 714 F. 2d 567 (5th Cir. 1983).

So far as strangers to the litigation are concerned, consent decrees are programs voluntarily adopted by the parties. The provisions of the decree may be challenged to the same extent these voluntary programs may be challenged. See Sam Fox Publishing Co. v.

United States, 366 U.S. 683 (1961). We must treat the quota affecting Disney School as a program voluntarily adopted by Chicago's Board of Education, which it is.

If the Board had adopted a resolution imposing a racial quota on Disney School, students excluded from the school could have challenged their exclusion without showing that the Board's entire attendance policy is unconstitutional. A litigant is entitled to challenge governmental acts that apply to him, for the Constitution requires the Board to treat him as a person, and not merely as a member of a group identified by race. The plaintiffs are not pieces to be moved around in a board game, with no redress unless they can show that all of the rules of the game are stacked. A person aggrieved by one discriminatory clause in a statute need not show that every clause is unconstitutional. The

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Supreme Court has held that sections of statutes must be evaluated individually. E.g., Papasan v. Allain, 106 S. Ct. 2932, 2945-47 & n.17 (1986), rejecting an argument that discriminatory implementation of one statutory provision may be madeup for by countervailing effects elsewhere. The Court has rejected "bottom line" defenses in the law of discrimination. Connecticut v. Teal, 457 U.S. 440 (1982) (Title VII of the Civil Rights Act of 1964). The existence of a device that affects people adversely according to their race may not be justified by some other device that benefits other people of the same race. Neither the decree nor the existence of countervailing clauses allows a court to decline to adjudicate a challenge to a particular provision that affects third parties. Yet that is what the panel did. It accepted a "bottom line" defense without

differentiating the rights of the plaintiffs from the interests of racial groups.

The panel did not explain why the plaintiffs must attack the whole decree in order to be heard on their own claims. One potential reason could be that consent decrees bind strangers to the litigation in a way that a plan unilaterally promulgated by the School Board does not, but that reason would be inconsistent with Firefighters. Another reason could be that there is something special about attendance plans for school districts, whether or not embodied in consent decrees, so that plaintiffs must challenge the whole plan. This reason would be inconsistent with the rule forbidding a litigant to raise the rights of others. A doctrine that makes jus tertii claims essential to constitutional litigation has little to recommend it and Article III of the Constitution to condemn it.

II

The district court in Johnson III relied on its earlier holding that the consent decree as a whole is constitutionally appropriate. The panel's reliance on Johnson III suggests that it, too, blessed the consent decree. Yet the panel did not address the constitutionality of the decree or any of its provisions, and this court has never done so before. The panel said (798 F. 2d at 1049) that "the plaintiffs' argument was adequately addressed in United States v. Chicago Board of Education, 554 F. Supp. 912 (N.D. Ill. 1983), aff'd, 717 F. 2d 378 (7th Cir. 1983)." But our opinion at 717 F. 2d 378 was concerned only with the district court's order to the United States to provide additional funds to the Chicago Board of Education. We have never passed on the adequacy of this plan as a whole, on its application to Disney School in particular, or on the feature

of the plan that gave rise to this case-the alteration in the quota every year to reflect changes in Chicago's population.

We have come close twice. Before the entry of the consent decree, we held in Johnson I and Johnson II that Chicago's voluntary quotas were constitutional. Johnson I was vacated with directions to consider mootness. Johnson v. Board of Education, 604 F. 2d 504 (7th Cir. 1979), vacated, 449 U.S. 915 (1980). After remand we reaffirmed the propriety of the quotas on the basis of Johnson I, see Johnson v. Board of Education, 664 F. 2d 1069 (7th Cir. 1981), and the Supreme Court vacated the decision again, this time with an opinion, 457 U.S. 52 (1982). The Court thought the consent decree required a reassessment of the situation. It reminded us (Id. at 53-54): "Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law

of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals." The Supreme Court expected our court to turn once more to the merits of racial quotas in Chicago's schools. But we have not done so. Johnson III was not appealed, and the panel in this case did not examine the question anew.

III

The merits of a case such as this are difficult to assess. Chicago has not been found to have engaged in racial discrimination in operating its schools. It has not confessed to such discrimination. We have not held that a quota system is an appropriate remedy for any misconduct that may have occurred in Chicago. Some such finding, based on a likelihood of a violation, is essential before children may be shuffled from one school to another on account of their race.

McDaniel v. Barresi, 402 U.S. 39 (1971), establishes that a school district may take race into account in devising its own remedy for discrimination in the operation of its schools. It need not wait for a judicial order. But McDaniel grew out of a former dual school system. Chicago was not a dual system. A plan that entails extensive use of race by public officials therefore requires strong justification. See Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986); Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Just how strong is a matter of dispute. The many opinions in Wygant show that the greater the private injury from the government's use of race as a ground of decision, the stronger the justification the government must supply. We must assume that plaintiffs' injury is substantial. Disney School, as a "magnet" school, is supposed to

"attract" students by virtue of superior offerings. It is one of the few public schools in Chicago with a pre-kindergarten program. Doling out opportunities to attend such schools on account of one's membership in a racial group requires justification. Five Justices in Bakke concluded that the use of race to decide who should receive a medical education requires powerful justification. 438 U.S. at 287-91 (Powell, J., joined by Burger, Rehnquist & O'Connor, JJ.), 1852-53 (O'Connor, J.). And see Fullilove v. Klutznick, 448 U.S. 448, 548 (1980) (Stevens, J., dissenting).

Disney school is not a medical school, but it is not fungible with other schools. We cannot say, at least not without evidence, that people who cannot attend Disney School will receive an equivalent education at another of Chicago's public schools. (This is also a reason why the plaintiffs did not need to

attack the consent decree as a whole. The use of racial criteria to assign students so as to eliminate the racial identity of otherwise-identical schools may be justified even thought the use of racial criteria to determine who shall attend an enriched school is not.) A strong justification is required before Chicago may turn people away from this school on the ground that "we already have enough of your kind"-which is roughly what Chicago told these plaintiffs, many of whose "kinds" have heard these words before.

The Chicago officials did not offer such justification here-at least the panel did not discuss any, and Chicago does not offer one in its reply to the petition for rehearing. The dominant theme in both the panel's opinion and the Board of Education's response is: "This has all been decided." But it has not been decided, and the necessary justification has neither

been offered by the Board nor been found sufficient by this court. Chicago's use of racial criteria to decide who shall receive the benefits of a superior school has not received from any court the "strict and searching" examination that is necessary. Bakke, 438 U.S. at 362 (opinion of Brennan, White, Marshall & Blackmun, JJ.). See also Sheet Metal Workers Local 28 v. EEOC, 106 S. Ct. 3019, 3036-37 (1986) (discussing use of racial preferences to "remedy past discrimination" and suggesting that the rationale for such preferences also limits their scope).

There is a further problem. The desegregation plan calls not only for an initial quota to eliminate any racial identity in the schools but also for annual adjustments to keep each school's racial mix in line with that of the whole school district. This sort of plan is similar to the one in Pasadena City

Board of Education v. Spangler, 427 U.S. 424 (1976). Spangler held that the Constitution does not require annual readjustments to keep each school in line with a changing population. Id. at 434-38. This case does not involve a plan imposed on Chicago by a court, but Spangler is relevant because both the parties and the panel have proceeded as if the consent decree were a remedy for an established wrong. The annual readjustment cannot be justified as a remedy. Firefighters holds that consent decrees may include remedies that courts could not impose on unwilling defendants, but it also observed that the concomitant of the parties' ability to go beyond what is required is exposure to the complaints of those injured by the excess. 106 S. Ct. at 3077-78. The excess here raises problems of its own.

The constitutional obligation of public officials is to assign students without regard

to race. When they violate that obligation, and when the schools become racially identifiable as a result, a court may require them to take race into account yet again to undo the racial identities. E.g., Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Columbus Board of Education v. Penick, 443 U.S. 449, 465-67 (1979). This remedy overcomes today's effects of yesterday's wrong. Spangler holds that there is no further obligation to keep each school's racial mix in line with that of the school system as time goes by. See also Swann, 402 U.S. at 22-25. Once the racial identity of the school has been eliminated, the wrong has been dealt with. The remedy extends no further than the effects of the violation. Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977). No one has suggested that Disney School is now or ever has been racially identifiable as a result of discrimination by

the School Board. The school district therefore is free under the Constitution, so far as the proof in this litigation demonstrates, to use a race-neutral system of assignment, at least at Disney. Riddick v. Norfolk School Board, 784 F. 2d 521 (4th Cir. 1986), cert. denied, 55 U.S.L.W. 3316 (U.S. Nov. 3, 1986) (applying this principle to an entire school system).

Continued use of race in assigning students, when under Spangler the school district is free to act in a race-neutral fashion, raises new problems, and it is potentially a new wrong. It certainly requires a new justification. There is a substantial argument that the provision of this consent decree calling for a continual updating of racial quotas is a new constitutional wrong. Whether the decree compels of just allows Chicago's officials to use racial criteria even after the lingering effects of earlier wrongs (if any) have been

extirpated should not matter.

This court had never passed on the crux of the objection to the provision in the consent decree that caused the plaintiffs to be excluded from Disney School. The provision is open to serious question. The use of race by the government to grant or withhold benefits is too important to be passed in silence. Race has been the Nation's most divisive problem. The treatment of people as representative of groups defined by race, rather than as individuals,is presumptively improper. One lesson now being taught in the public schools of Chicago is that race is more important than talent or dedication or learning potential in deciding who shall receive a superior education. This lesson is regrettable. Perhaps it is a necessary story, to be told for a short and transitional period. But no court has found that the City of Chicago must teach its

youngsters the importance of race or that it has any justification for doing so. Any person turned away by the government on account of his race is entitled to a respectful hearing by a court, a hearing at which the government must supply a powerful justification. Chicago has not offered a justification, and the plaintiffs in this case have not received their due from this court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
- EASTERN DIVISION

MARCO SAMAYOA, et al.,
Plaintiffs-Appellants

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
Defendants-Appellees

No. 80-4261-Judge Charles R. Norgle

ORDER

This suit alleges racial discrimination in the operation of the Walt Disney Magnet School, a Chicago public elementary school. The case comes before the court today on defendant's motion to dismiss plaintiffs' Fourth Amended Complaint, dated approximately Feb. 3, 1982. For the reasons discussed below, the motion is granted as to Counts I and II, but denied as to Count III.

Count I alleges that the defendants, the

Chicago Board of Education and various school officials, violated the constitutional rights of a group of children, aged 3-4. These children were originally admitted to the Walt Disney Magnet School's pre-kindergarten program in June, 1981, but their admission was revoked two months later, after the school district decided to revise the racial composition of the school to reflect changes in the racial composition of the geographic area from which the school draws pupils. (Fourth Amended Complaint, Count I, par. VII). Count I alleges that the defendants' actions were discriminatory because they revoked the admission of only Cuban, American-Indians and white students.

Count II is based upon the deed for the property on which the school stands. The property was granted by the federal government to the City of Chicago for the purpose of establishing a school; in the deed the city

allegedly agreed to comply with Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally-funded programs. (Complaint, (Count II, par.XIII). Count II alleges that the revocation of the children's admission to the school violates this contract between the federal government and the city. Paragraph XIV of Count II also alleges a series of other breaches of this contract, e.g. the lay-off of teachers and other staff, an increased student-teacher ratio, budget cuts and other changes allegedly weakening the school's educational program. The complaint alleges that these changes contribute to "white flight" by making the magnet school less attractive and therefore contravene the goals of Title VI.

Count III alleges both a due process and an equal protection violation of the rights of the children whose admissions were revoked. The complaint alleges that on October 20, 1981 the

school board held a "purported hearing" regarding the revocation. This hearing did not meet minimum standards of procedural due process, however, according to the complaint. Furthermore, after the hearing the Board subsequently admitted 5 and 6-year-olds who were originally rejected with the younger plaintiffs here, but did not give a reason for treating the younger children differently.

Plaintiffs seek injunctive relief and specific performance of the deed to prevent the school board from continuing to discriminate against the plaintiff's racial and ethnic groups. Plaintiffs also seek compensatory and exemplary money damages. Although this suit originally was filed as a class action, plaintiffs in their status report now state that it is being brought only on behalf of the plaintiffs in their individual capacities.

Dismissal of Counts I and II

Count I is dismissed by applying the

rationale of United States v. Board of Education of Chicago (Johnson III), 567 F. Supp. 290 (N.D. Ill. 1983). The Johnson plaintiffs challenged the racial quotas established at two individual Chicago high schools. Judge Shadur held that court approval of a desegregation plan for the entire school system in United States v. Board of Education of Chicago, 554 F. Supp. 912 (N.D. Ill.), aff'd 717 F. 2d 378 (7th Cir. 1983); precludes attacks on separate aspects of the plan, taken in isolation. The court stated,

> The whole Plan desegregates the school system by techniques that individually classify by race and that individually (that is, if a particular technique were the only ingredient in the game plan) might be impermissible under the Constitution. Johnson III, supra at 296.

The court went on to hold that with the entry of the consent decree, claims of individual constitutional deprivation had been transformed into claims that must be scrutinized against the plan as an entirety.

Because individual claims are in reality a collateral attack on the overall plan, which has passed constitutional muster, the individual claims cannot stand. The court therefore granted summary judgment for the Board.

Plaintiffs in the case before us have admitted (most recently in their status report, Dec. 18, 1984, p.1) that the actions complained of in Count I were done to comply with the overall desegregation plan. Thus Count I challenges an individual aspect of the overall plan, and the rationale of Johnson III applies with equal force to this case. Judge Getzendanner made a similar ruling on December 13, 1983 in denying the plaintiff's most recent motion for a preliminary injunction. This court sees no reason to disagree with Judge Getzendanner's ruling and therefore Count I is dismissed.

On August 31, 1981 Judge Getzendanner also

dismissed an earlier complaint in this case which adequately disposes of Count II of the current complaint. In her decision she held that the plaintiffs had not alleged adequately racial discrimination as the cause of the changes made in the Disney School's program. Title VI of the Civil Rights Act of 1964 prohibits a recipient of federal funds from excluding, denying benefits to, or otherwise discriminating against anyone on the basis of "race, color, or natural origin." 42 U.S.C. sec.2000d. Judge Getzendanner reasoned that because the school was fully-integrated, any detrimental changes in its program were borne equally by all races and ethnic groups.

This court agrees with Judge Getzendanner's ruling on the lack of racial discrimination in Count II and further agrees with her analysis of the standing problem. She held that the plaintiffs could not base their claim of racial discrimination on racially-neutral policies

which might cause discrimination in the future by resegregating the school, (the plaintiff's "white flight" allegation) because the injury was too speculative. Even if future damage were certain, the plaintiffs in the instant case lack standing to assert the rights of possible future victims of discrimination because these plaintiffs have suffered no "injury in fact, economic or otherwise." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Therefore we do not have subject matter jurisdiction under Article III of the Constitution, which requires that there be an actual "case or controversy" before the Court.

Count II of the current complaint does not differ significantly from the one dismissed by Judge Getzendanner, except that it is more clearly based upon a theory that plaintiffs are third-party beneficiaries of the deed between the federal and city governments. There is no

violation of the deed, however, if no racial discrimination exists. Because the defendants have violated neither Title VI nor any other federal anti-discrimination statute by their alleged action in Count II, the plaintiffs have failed to state a claim, and Count II is dismissed.

Count III

Count II of the current complaint states a claim upon which relief can be granted. Under normal circumstances, plaintiffs would have no constitutional right to attend a particular school, especially when the Board's refusal to allow them to attend result from a court-sanctioned desegregation plan designed to vindicate constitutional rights. Nevertheless, once the school told the students they were admitted, it may be that a constitutionally protectible property right arose.

"Property" denotes a broad range of interests that are secured by "existing rules

or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Defendants here promised plaintiffs a unique governmental benefit, especially because similar educational programs were not available to children of this age elsewhere in the Chicago public school system. The original admission of the children may not be sufficient, however, to create an "entitlement" to this benefit. A merely subjective "expectancy" is not protected by due process. Perry v. Sinderman, 408 U.S. 593 (1972). Nevertheless, the plaintiffs here should be given an opportunity to prove that the "policies and practices" of the school board created an entitlement through the original admission of the children. Perry, supra.

We do not go as far in this decision as Judge Getzendanner did on October 13, 1981 when she ruled that the "right to attend the school must be viewed as a substantial property right." (Memorandum Opinion, p.6). Our decision allows for the possibility that such a right exists, however.

Once a protectible property interest arises, it cannot be taken away without procedural due process. Therefore, even if the school district revoked the admissions in order to comply with the overall desegregation plan, the way in which they revoked the admissions may violate constitutional standards of due process. Count III alleges that a post-deprivation hearing was held, but that it did not meet minimum due process standards. On a motion to dismiss we must treat the factual allegations of the complaint as true, and view them in the legal light most favorable to the plaintiff. Estelle v. Gamble, 429 U.S. 97 (1976). Viewed in this

light, the facts as alleged in Count III state a claim which cannot be dismissed.

Once discovery has been conducted on this count, however,it may very well be possible to decide its merits on a motion for summary judgment. The court should be able to decide as a matter of law whether an entitlement arose and whether the hearing was adequate.

Furthermore, we find no merit to plaintiff's equal protection claim in Count III because plaintiffs do not constitute a "suspect class" as compared with slightly older children of the same race. Also, plaintiffs may challenge this aspect of the defendants' actions adequately under the due process clause, because the defendants allegedly gave no reason for their action.

In conclusion, Counts I and II of the complaint are dismissed. Plaintiffs have attempted, through five successive complaints, to state a cause of action based upon the same

or similar facts as those alleged in Counts I and II. We remind the plaintiff that under Fed. R. Civ. P. 15(a) a party must request leave of court to amend his pleadings, and this court will not grant leave to plaintiffs to file any further complaints based upon the same theories we have found deficient in this complaint. Count III states a claim, however, at least at this point in time, and will not be dismissed.

IT IS SO ORDERED.

CHARLES R. NORGLE, Judge
U.S. District Court

DATED: 1/28/85

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al,
Plaintiffs

-v.-

BOARD OF EDUCATION OF
THE CITY OF CHICAGO, et al.,
Defendants

No. 80-C 5124, 76 C 995 and 76 C 996
Judge Milton Shadur
July 14, 1983

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

This Court's January 6, 1983 memorandum opinion and order in the United States action (the "Opinion," 554 F. Supp. 912, 928) approved the desegregation plan (the "Plan") developed by the Board of Education of the City of Chicago ("Board") "as being clearly within the 'broad range of constitutionally acceptable

plans'." Final judgment (the "Judgment") upholding the Plan's constitutionality was then entered February 11. Board has now moved for judgment as a matter of law in the Johnson and Milton cases recently consolidated with the United States action, arguing the Opinion and Judgment are dispositive of the constitutional issues raised in Johnson and Milton. For the reasons stated in this memorandum opinion and order Board's motion is granted.

Background

Some four years ago our Court of Appeals first dealt with the Johnson and Milton actions in Johnson v. Board of Education, 604 F. 2d 504 (7th Cir. 1979). It summarized the relevant factual background, Id. at 507-09, footnote omitted:

> These consolidated civil rights actions for declaratory judgment and injunctive relief were filed on March 15, 1976, challenging as unconstitutional a desegregation plan adopted voluntarily by the Board of Education of the City of Chicago in an effort to arrest the trend toward segregated

enrollments at two Chicago public secondary schools. The challenged desegregation plan, commonly referred to as the "Student Racial Stabilization Quota Plan" ("Plan" in this quotation), established a ceiling on enrollments and imposed racial quotas with respect to admissions at Morgan Park and Gage Park High Schools.

Plaintiffs-appellants in (Johnson) are black children and their parents residing in the Morgan Park High School attendance area. Plaintiffs-appellants in (Milton) are black children and their parents residing in the Gage Park High School attendance area. Plaintiffs' complaints alleged that the Plans, as instituted at Morgan Park and Gage Park High Schools, deprived them of their rights under the Constitution and under title 42 U.S.C. secs. 1981 and 1983, and under Title 20 U.S.C. sec. 1703(c) because the Plans restricted the admission of minority students to these high schools solely on the basis of race...

(Board) filed answers to the complaints, denying the Plans were unconstitutional and denying plaintiffs were deprived of any rights under federal law. (Board) further alleged that plaintiffs had no constitutional right to attend Morgan Park or Gage Park High School since the Board of Education, vested by state statute with the supervision and management of the public school system of the City of Chicago, is empowered to divide the city into attendance areas and to apportion the pupils to the several schools, taking into consideration the prevention of racial segregation in the public schools. In the performance of these statutory duties, the Board contended the

Plans were necessary to alleviate overcrowding and to promote integration at Morgan Park and Gage Park High Schools, both of which had experienced an accelerated change in the size and racial composition of their enrollments as a result of a concomitant demographic change in the residential neighborhoods encompassing the attendance areas of these schools.

On April 29, 1976, three days after the filing of (Board's) answer, plaintiffs in Johnson presented a motion for a temporary restraining order seeking to enjoin the implementation of the Plan at Morgan Park High School, which was scheduled to begin the next day with a lottery drawing to select the incoming freshman class for the fall of 1976. The district court (Will, J.) denied the motion. On August 17, 1976, after extensive discovery by means of interrogatories and document production, plaintiffs filed a motion for a preliminary injunction or in the alternative for summary judgment. On September 27, 1976, the district court denied the alternative motion for summary judgment, but deferred ruling on plaintiffs' motion for preliminary injunction, stating its preference for a modification of the Plans to include a voluntary busing program for students excluded from these two schools to attend alternative integrated high schools.

At the conclusion of discovery, entry of a final pretrial order, stipulation of additional facts and admission of exhibits into evidence, and after both parties agreed to withdraw objections, the parties rested on June 27, 1977. At that time, counsel for the Board advised the court of a pending

modification of the Plans to be acted upon at the next Board meeting. The district court stated it was prepared to find the Plans as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

On July 13, 1977, the Board adopted a modification of the Plans, which provided bus transportation to white or integrated schools from a convenient point near the residences of all students in the Gage Park and Morgan Park attendance areas who were not selected for admission to these two schools under the Plans. By an order of the district court entered August 12, 1977 the Board was directed to implement procedures for publicity and student counseling with respect to the Plans, as modified, and further, to provide that designated spaces at the alternative schools which were not filled by students excluded from one school (e.g., Gage Park) would be made available to students excluded from the other school (e.g., Morgan Park).

On December 30, 1977, the district court entered its findings of fact and conclusions of law, and granted judgment in favor of (Board). The court held that the Plans, as modified to include bus transportation to primarily white or integrated schools for those students not admitted to Gage Park or Morgan Park High Schools, restored to plaintiffs their constitutional rights in that plaintiffs had a meaningful opportunity to attend a Chicago public high school in an integrated setting. The court further ordered that (Board) be enjoined to continue the Plans, as modified.

In affirming the district court's order, the Court of Appeals concluded (Id. at 518):

> Accordingly, in view of the findings on the record of the existence of white flight and the compelling state interest in promoting integration, we hold that voluntary state action directed toward the prevention of de facto segregation in the public schools is constitutionally permissible where, as here, the racial quotas imposed in connection with the desegregation plan provide all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school.

Although the Supreme Court initially granted certiorari, 448 U.S. 910, 100 S. Ct. 3055, 65 L.Ed. 2d 1139 (1980), it later vacated that grant and remanded Johnson and Milton to our Court of Appeals to consider whether the actions were moot in light of (1) Board's decision to rescind the stabilization plans and (2) this Court's September 24, 1980 order approving and entering the Consent Decree (the "Decree") in the United States action. 449 U.S. 915, 101 S. Ct. 339, 66 L.Ed. 2d 162 (1980). See Opinion, 554 F. Suppl. at 913 n. 1. In turn

our Court of Appeals remanded Johnson and Milton to this Court's colleague Judge Will, 645 F. 2d 75 (7th Cir. 1981).

Pending final development of the Plan, Board reinstated its stabilization plans for Morgan Park and Gage Park High Schools in April 1981. In June 1981 Judge Will accordingly found Johnson and Milton were not moot, but he again denied plaintiffs' motion for a permanent injunction against use of the challenged quotas. Our Court of Appeals (1) affirmed Judge Will's finding the cases were not moot and (2) reinstated its earlier opinion in Johnson. 664 F. 2d 1069, 1073 (7th Cir. 1981).

Once again the Supreme Court granted certiorari but then vacated and remanded in a per curiam opinion, 457 U.S. 52, 102 S. Ct. 2223, 72 L.Ed. 2d 668 (1982). It said (Id. at 53-54, 102 S. Ct. at 2224):

> We agree with the Court of Appeals that the case is not moot and that the subsequent development (i.e., entry of the Decree) does

> not undermine that court's original decision upholding the racial quotas. However, since if we were to grant certiorari we would consider the constitutional challenge as an original matter, the subsequent development might well be relevant to that consideration. It was for that reason that we vacated the Court of Appeals' judgment for further consideration in light of the subsequent development. No additional evidence was taken and therefore neither the record nor the District Court or Court of Appeals opinions reflect the subsequent development. We therefore grant certiorari, vacate the judgment, and remand the case with the direction that the matter be consolidated with the ongoing proceeding in the District Court in United States v. Board of Education of Chicago, No. 80-C-5124, so that court may decide petitioners' challenge on the basis of a complete factual record. Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals.

So Johnson and Milton were consolidated with the United States action pending before this Court, and Board's present motion asks this Court to rule on the merits of those actions in light of the "complete factual record" developed in the United States action.

Clearing the Underbrush

Board's initial brief argued:

1. This Court's Opinion and Judgment necessarily determined the constitutionality of the "controlled enrollment" (that is, quota) provisions of the Plan now governing Morgan Park and Gage Park High Schools (Mem. 6-13).

2. In any event plaintiffs have no constitutional right to attend their preferred school, so no rights are violated by their exclusion or potential exclusion from any particular schools (Id. at 14-16).

Some of Board's language evidently led plaintiffs to believe Board was contending they were bound, in the sense of claim preclusion (res judicata) or issue preclusion (collateral estoppel), by the Opinion and Judgment. Thus plaintiffs' opening argument (Ans. Mem. 1-5) was devoted to making the obvious point res judicata and collateral estoppel principles are not involved here. As Board says (R. Mem. 13-14

& n. *), the real issue is rather whether Johnson and Milton now represent collateral attacks on the Opinion and Judgment.

Board also initially chided plaintiffs for not having petitioned to intervene in the United States action. Mem. 11-13. As plaintiffs correctly respond (Ans. Mem. 5-6), their "failure" to intervene must be read in light of the fact their lawsuits predated the United States action. They simply did not face the situation of potential intervenors, who seek intervention to assert rights they have not previously advanced. Thus the intervention case law cited by Board (Mem. 9-13) cannot alone be dispositive here.[1]

On still another non-issue in the case, plaintiffs do not advance their cause by questioning (Ans. Mem. 10-12) Board's good faith in first adopting its stabilization quota plans and then retaining them in modified form in the Plan.[2] Surely the Supreme Court's

remand of Johnson and Milton for consideration in light of the Decree's implementation calls for evaluation of plaintiffs' claims in the context of what this Court has found are Board's obvious good faith efforts to meet its obligations under the Decree and to this Court.

Plaintiffs have, however, helpfully clarified the nature of their claim (Ans. Mem. 7-8, footnote omitted):

> The Board utterly misconstrues the thrust of plaintiffs' action. Plaintiffs do not claim an independent constitutional right to attend a neighborhood school. Instead, Plaintiffs' claim is based on the right to equal treatment: the Board's quotas deny black children that reside in the Cage Park and Morgan Park attendance areas the opportunity to attend a neighborhood school when this opportunity is not similarly denied to any white child that resides in these attendance areas, or anywhere else in the city of Chicago. This, plaintiffs urge unconstitutional discrimination on the basis of race.

See also R. Mem. 4. It is to that claim this Court now turns.

Synergism: The whole Plan and Its Parts

Plaintiffs' claim of racially unequal

treatment or racially unequal burdens is not literally correct. Board points out (R. Mem. 2 n.) it has now adopted a controlled enrollment program at an over 65% white enrollment school. And plaintiffs themselves admit (Ans. Mem. 8 n.) white students may be denied access to their neighborhood schools where those schools have been designated under the Plan for reception of students from outside those neighborhoods: magnet schools, metropolitan high schools or scholastic academies.[3]

That kind of dialogue, however, implies a duty to weigh the Plan's control provisions separately and apart from its other provisions. To avoid any such limited balancing analysis, this opinion will instead indulge a hypothesis more favorable to plaintiffs than the facts justify: that the Morgan Park and Gage Park enrollment controls (viewed in isolation) operate to exclude only neighborhood black students from attending those schools.

Plaintiffs maintain (Ans. Mem. 8-13) such racial classifications must be subjected to constitutional "strict scrutiny," imposing on Board the obligation to prove those classifications are necessary to accomplish a compelling state interest. See Johnson, 604 F. 2d at 515 n. 5. And plaintiffs conclude judgment for Board is precluded because Board has not met that obligation on the present record.

But plaintiffs confuse the question of the level of scrutiny with the question of what is to be scrutinized. Contrary to plaintiffs' assertion (Mem. in Resp. to U.S. Comments 1-5), this Court did not employ a "reduced" level of scrutiny in approving the Plan. True, this Court accorded deference to Board's choice of constitutional means-but only when measured against the yardstick of its strict constitutional obligations. This Court made it plain Board would be held strictly to the

Constitution's requirements (see Opinion, 554 G. Supp. at 915), and the Opinion repeatedly emphasized the Plan was approved only because its provisions were constitutionally permissible, even if the particular remedies chosen were arguable in administrative-judgment terms (Id. at 920, 922, 923).

Stripped of rhetoric, plaintiffs' contention is really that (1) each individual aspect of the Plan and (2) every impact of every element within it must pass strict constitutional scrutiny. As the rest of this opinion reflects, Board's contrary argument (Mem. 8) is both perceptive and persuasive:

> In effect, the narrow and specific relief sought by the Johnson and Milton, plaintiffs was subsumed by that provided in the United States action, which was brought on behalf of all the minority students in the Chicago public schools.

In essence plaintiffs' claim represents another species of the argument for racial balance in all schools, an argument rejected by

the Opinion, 554 F. Supp. at 923. That quest for numerical parity flew in the face of the fact it was simply not feasible-and more important for present terms, is not constitutionally necessary-to desegregate all predominantly minority schools. Id.

What plaintiffs fail (or refuse) to acknowledge is that individual aspects of the Plan, in isolation from one another must necessarily impact disproportionately on white students and minority students. Obviously enrollment controls in a student population that is 60% black on a system-wide basis will more often impinge on blacks than on the 16% white student population. And similarly a particular program or site decision might impact disproportionately on the 20% Hispanic student population.[4] But those points suggest only that it is the whole with which a desegregation plan is necessarily concerned. And it is the whole that must be

constitutionally judged. Cf. Keyes v. School District No. 1, 521 F. 2d 465, 479 (10th Cir. 1975) (finding heavier transportation burden on minority students permissible in context of burdens of overall transportation plan), cert. denied, 423 U.S. 1066, 96 S. Ct. 806, 46 L. Ed. 2d 657 (1976).

Board points (R. Mem. 6, 8-9) to the administrative burden that would be caused if it had to assure each desegregative technique independently met "strict scrutiny." Administrative burdens of course are not dispositive. Far more critical here is the point (Id. at 11-13) that claims like plaintiffs' have in context become collateral attacks on the Judgment. This is not a matter of intervention vel non in the United States action[5] but in terms of legal equivalence plaintiffs' current assertion of their claims is much like seeking to intervene to contest a particular Board decision that implicates

racial factors.[6] Such intervention-such attack-must be gauged in terms of whether the claims arguably contest the constitutionality of the Plan as a whole.

In a corresponding way, this Court's approval in the Opinion and the Judgment must preclude attacks on separate facets of the Plan, taken in isolation. Approval of the Plan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum, isolated from the other aspects of the Plan. That is because the whole really is more than the sum of its parts: The whole Plan desegregates the school system by techniques that individually (that is, if a particular technique were the only ingredient in the game plan) might be impermissible under the Constitution.

Controlling black enrollment in a given school as part of a plan to desegregate an

entire system is just not the same thing as imposing a black quota independently. That is what our Court of Appeals meant when it originally upheld Judge Will's order. 604 F. 2d at 518. That is what plaintiffs themselves really acknowledged when they first asked the Supreme Court to overturn Judge Will and the Court of Appeals (Brief for Petitioners on Writ of Certiorari, No. 79-1356 O.T. 1979, at 15 n.):

> Where a system-wide desegregation effort distributes burdens equitably between the races. . . there is no equal protection violation.

And that is what the Supreme Court must have anticipated when it remanded Johnson and Milton for consolidation with the United States action: Implementation of the Decree has transformed claims of individual constitutional deprivation into claims that must be scrutinized against the Plan as an entirety.

So viewed, plaintiffs' contentions do become

collateral attacks on a Plan that has passed constitutional muster. This Court has found the burdens of the Plan (in terms of students in attendance outside their neighborhood schools) impact in a way strikingly proportional to the racial makeup of the school population as a whole, 554 F. supp. at 922-23. Any such outcome must perforce be the result of heavier impact in some places and lighter impact in others-else every component of the system would have to replicate in microcosm what the entire system reflects in macrocosm. And that the Constitution has never mandated, see Id. at 923-24. For that reason plaintiffs' efforts to compel further factual probing into Board's motives are bootless, for the actions sought to be stigmatized are part of a nondiscriminatory whole.

Accordingly this Court finds the Judgment entitles Board to judgment as a matter of law in Johnson and Milton. Those action are

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accordingly dismissed on the merits with prejudice.

MILTON SHADUR, Judge
U.S. District Court

1 As the later discussion reflects, however, there is a relevant analogy between plaintiffs' assertions and those of the most recent unsuccessful intervenors in the United States action.

2. Board's current quota systems for the two high schools is explained in detail at Plan 84-99, 263-66; School by School Analysis D. 12, 18; and August 1981 Progress Report 136-42. There is no factual dispute in that respect.

3. Moreover, black students barred from Morgan Park and Gage Park High Schools are eligible to transfer to such "magnet" and other integrated programs and schools. Board Mem. 6 n. *.

4. This was the complaint of the most recent effort to intervene, which focused on the Plan's treatment of Harrison High School.

5. This Court had the proposed Plan under advisement for many months to consider both comments by interested parties and, of equal importance, the extent to which the initial implementation appeared to support or to refute Board's projections. Though the Supreme Court's remand came some eight months before the Opinion issued, plaintiffs made no effort to provide the kind of input to the United States action as did other interested parties.

6. See this Court's May 12, 1983 memorandum opinion and order in the United States action (denying a petition to

intervene by students and parents of students of a high school scheduled for closing). This Court of course recognizes the differences between the tests for intervention and the standards applicable to a separate lawsuit against the Board, see United States v. South Bend Community School Corp., 710 F. 2d 394 (7th Cir. 1983). What the text statement refers to is the substantive constitutional test, rather than the procedural hurdles a prospective intervenor must overcome.

APPENDIX E

Constitutional Provisions and Statutes

I. Constitution of the United States of America

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. 42 U.S.C.

1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licences, and exactions of every kind, and to no other.

1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.